No. 661 94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,
Petitioner

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE UNDER INDENTURE DATED THE 21ST DAY OF MARCH 1928, BETWEEN CHARLES L. COBB AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ET AL.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York

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BRIEF FOR RESPONDENTS HANS DIETRICH SCHAEFER, BRUNO CARL REINICKE, ROBERT HANS REINICKE AND JOHANNE MARIA REINICKE SCHAEFER IN OPPOSITION

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Jurisdiction

The Petitioner has failed to demonstrate that the Supreme Court has or should assume jurisdiction. Although the Petitioner on December 6, 1955 filed in the Supreme Court, New York County, a notice of appeal to this Court, he now admits that no appeal lies but "that certiorari is the appropriate remedy" (Petition, p. 9, ftn. 7). We submit that the decision of the State Court rested on an adequate nonfederal ground and that the issuance of a writ of certiorari is otherwise unwarranted.

Question Presented

The "Amendment to Vesting Order 4551", dated April 6, 1953, recites precisely the same list of alleged "nationals of a designated enemy country" (R. 54-55) as owners of the property being vested as does earlier Vesting Order 4551, dated January 29, 1945 (R. 67-68). No new or different *enemy* interests are vested by the "Amendment." A judgment rendered in the prior litigation denied that Petitioner was entitled to immediate possession of the *corpus* of the trust and of all accumulations. Similar relief requested by the Petitioner in this litigation was again denied on the principles of *res judicata*.

Consequently, the question presented, if any, is whether Petitioner, by the "Amendment to Vesting Order 4551", issued in circumvention of and contrary to the prior judgment, became entitled to the immediate possession of the trust property in disregard of principles of *res judicata*.

Statement

The action was brought by The Chase National Bank of The City of New York, Trustee under the indenture specified in the caption (hereinafter briefly "Trustee") for judicial settlement of its intermediate account of proceedings under an *inter vivos* trust. In view of the request of the Attorney General, as Successor to the Alien Property Custodian (hereinafter briefly "Custodian" or "Petitioner"), to deliver to him the trust property, the Trustee also asked the court to determine whether or not the principal of the trust should be transferred to the Custodian.

The Custodian, who was a party defendant to this action, appeared generally and filed an answer, demanding affirmative relief. He demanded judgment adjudging him to be entitled to immediate possession of the *corpus* and income of the trust, and ordering the payment and delivery of said property to him after the deduction of all expenses and charges.

Although certain objections were raised by the Custodian against the account of proceedings of the Trustee, the portion of the judgment of the Supreme Court, New York County, judicially settling the account of proceedings of the Trustee, is for all practical purposes beyond dispute.

Beyond dispute also are the following relevant and salient facts:

The trust herein is a continuing trust and has not terminated; the remainder interests created under the Trust Indenture (Article 6) are contingent in their nature; there are outstanding beneficial interests under the trust which have not yet validly vested; the ultimate remaindermen are not ascertainable and cannot be identified at this time (R. 160).

The trust fund and accumulated income thereof is held by the Trustee under the Indenture of Trust, dated March 21, 1928, and is not properly payable or deliverable to, or claimed by, or held for, or owned by any person, but is to be held, administered and disposed of by the Trustee as provided in the Indenture of Trust for future distribution not to take effect earlier than after the death of the survivor of Bruno Reinicke and his wife. All income is to be accumulated and added to the principal as provided in the Indenture, and authorized by the law of Illinois governing the trust (R. 160). Bruno Reinicke, Jr., the settlor, and his wife, and their three children, Bruno Carl Reinicke, Robert Hans Reinicke and Johanne Maria Reinicke Schaefer, were living on April 6, 1953 and are still living.

By Vesting Order 4551, dated January 29, 1945, (R. 67) the Custodian vested "all the right, title, interest, and claim" in the trust of Bruno Reinicke, his wife and the three children.

Although the Supreme Court of the State of New York has determined in the prior litigation as well as in this litigation that the ultimate remaindermen are not ascertainable and cannot be identified then or now, the Custodian, in complete disregard of the prior judicial determination,

listed in the "Amendment to Vesting Order 4551" the same persons as were listed in the 1945 Vesting Order, and found that the property was owned by them and determined that they were "nationals" of Germany. In order to circumvent the binding effect of the prior valid adjudication, the Custodian purported to vest in himself the "res" of the trust.

The Custodian did not formally vest the interests of the infant Hans Dietrich Schaefer either by specifically stating his name, or by naming a class of which he is a member (R. 53-56). Yet, indisputably, he is an American citizen by birth, born August 15, 1953 at Detroit, Michigan (R. 159). He has a contingent interest in the trust fund and he may become entitled to the entire principal and accumulated income thereof upon the termination of the trust (R. 159).

The crux of the controversy before the New York courts was whether the Custodian, by virtue of an instrument issued by him on April 6, 1953, entitled "Amendment to Vesting Order 4551", could obtain possession and control of a trust *corpus* in circumvention of the prior judgment of the New York Supreme Court, affirmed by the Appellate Division and by the Court of Appeals, or whether the trust property should continue to be held and administered by the Trustee in accordance with the provisions of the Trust Indenture and said prior judgment.

The judgment of the New York Supreme Court directed the Trustee to retain the principal and accumulated income of the trust under the indenture dated March 21, 1928 as provided therein. It further decreed that no payment of income, of principal, or of accumulated income, should be made to any beneficiary without 60 days' written notice to the Custodian by registered mail (R. 177). The interests of the United States are therefore fully safeguarded by Vesting Order 4551 and the above requirement of notice. The administration of the trust in accordance with the indenture is thus preserved and the principles of *res judicata* are observed.

Reasons for Denying the Petition for a Writ

A. The decision of the State Court rested on adequate nonfederal grounds.

This Court has repeatedly stated that jurisdiction cannot be founded upon surmise. It said in *Lynch* v. *New York*, 293 U. S. 52, 54:

> ". . . Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

See also:

Stembridge v. *Georgia*, 343 U. S. 541, 547;
Ellis v. *Dixon*, 349 U. S. 458, 459.

The decision of the Supreme Court of New York rested on adequate nonfederal grounds. It is incontrovertible that an action for judicial settlement of a trustee's account of proceedings brought by a New York trustee involving trust funds located in New York is within the jurisdiction of the New York courts of equity. That the trust in the instant case is governed by the law of Illinois does not create a federal question. The denial of the relief requested by the Custodian that he was entitled to the immediate possession of the trust *corpus*, and the instructions of the Court to the Trustee directing the Trustee to retain the trust property and to continue the administration of the trust, were clearly within the jurisdiction of the New York Supreme Court. Its decision rested on the principles of *res judicata*.

A binding previous adjudication was pleaded by the Trustee in its complaint (R. 12-17). The defense of *res judicata* was interposed in the answer of the Guardian ad Litem for Hans Dietrich Schaefer (R. 83) and the answer of Bruno Carl Reinicke, Robert Hans Reinicke and Johanne Maria Reinicke Schaefer (R. 93-94). The only opinion written, the opinion of the Supreme Court, New York County (R. 338-339), together with the decision (R. 150, 155-160) clearly shows that the determination made in the prior litigation was held by the court to be a complete bar to the Custodian's present claim.

The Custodian himself admitted that *res judicata* was a ground for the decision of the New York Supreme Court and of the Appellate Division, First Department, of that Court, by stating in the affidavit of George B. Searles, sworn to July 26, 1955,* in support of the Motion for Leave to Appeal to the Court of Appeals that one of the questions raised and of importance was:

> "(c) Whether a judgment that the Attorney General was not entitled to recover any part of the trust property on the basis of an order which vested merely the right, title and interest of the beneficiaries was *res judicata* of the Attorney General's right to possession of the property under a subsequent order which vested the trust res itself."

* Although the briefs of the Petitioner filed on the appeal to the Appellate Division and in support of the Motion for Leave to Appeal to the Court of Appeals are not a part of the record, they show that *res judicata* as a ground for the denial of the relief sought by the Custodian was discussed *in extenso*. Moreover, the record itself clearly demonstrates that the judgment in the prior litigation is and was deemed a complete bar to the Custodian's present claim (see particularly R. 155-159). That judgment specifically decreed that the exercise of administrative powers con-

* Printed copies of the affidavit are lodged with the Clerk of this Court (Petition, p. 9, ftn. 6).

ferred upon the Trustee by the Trust Indenture shall remain in the Trustee and that the Custodian has not succeeded to the powers of the settlor and his wife over the management and disposition of the trust *corpus* or of trust income (R. 221-223).

The judgment in the case at bar properly preserved the rights fixed by the earlier decree, even as it gave full protection to the interests of the United States.

It is true that the question of the constitutionality of the "Amendment" to Vesting Order 4551, dated April 6, 1953, issued after the state of war between the United States of America and Germany was terminated on October 19, 1951, and its unlawfulness under the Trading with the Enemy Act, was argued before the Supreme Court of the State of New York. Yet there is no scintilla of evidence in the record that the question was actually decided or that the judgment as rendered could not have been given without deciding it.

It is well established by decisions of this Court that *res judicata,* like other kinds of estoppel ordinarily is a matter of state law. A decision that the question in issue is *res judicata* does not present a federal question. As the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to deny the petition.

Northern Pacific R. Co. v. *Ellis,* 144 U. S. 458;
San Francisco v. *Itsell,* 133 U. S. 65;
Adams v. *Louisiana Board of Liquidation,* 144 U. S. 651.

B. There is no conflict of decision.

The contention of the Petitioner that "The action of the New York courts in this case is irreconcilable with controlling decisions of this Court" (Petition, p. 10) is not well taken.

In *Zittman* v. *McGrath,* 341 U. S. 471, the Custodian demanded transfer of a credit from a debtor bank which

had no interest in the credit except that of stakeholder. Similarly, in *Brownell v. Singer*, 347 U. S. 403, decided on the authority of the *Zittman* case, the fund to be paid over to the Custodian pursuant to a "turnover order" involved a fund of a Japanese bank's New York Agency in liquidation in the hands of the New York Superintendent of Banks. In the instant case, the bank is a Trustee which has the legal title to the property and administers the trust in accordance with the rights and duties fixed by the Indenture of Trust.

In the *Zittman* case the Vesting Order vested debts owed to a foreign national by a New York debtor bank, and debts evidenced by instruments endorsed by the foreign national and held by a Federal Reserve Bank. The Custodian also served a "turnover directive" describing the specific property which he required to be turned over to him.

In the instant case the New York courts held in the previous litigation that the equitable ownership of the trust fund cannot be ascertained until the termination of the trust. The Custodian completely ignored this determination in the "Amendment" to the Vesting Order. Since the underlying facts, to wit "enemy interest" in the trust as specified in the Vesting Order, as well as in the amendment thereto, are identical, the "Amendment to Vesting Order 4551" was but a mere device to circumvent the binding effect of previous adjudication. The New York courts properly adhered to their previous determination.

Another fact brings into sharp focus the consequences of disregard of that determination. Hans Dietrich Schaefer, an American citizen by birth, has a contingent interest in the trust fund and he may become entitled to the entire principal and accumulated income thereof upon the termination of the trust. His interest was not vested by the "Amendment" to the Vesting Order. The delivery of the trust property to the Custodian will in effect destroy the trust. The infant's opposition to the relief sought by the Custodian was based on a genuine necessity to defend his rights in this action.

In *Zittman* v. *McGrath*, 341 U. S. 446, this Court held that in the case of a "right, title and interest" vesting order the Custodian stepped into the shoes of the enemy banks, and in *Zittman* v. *McGrath*, 341 U. S. 471, it held that in the case of a so-called "res" vesting order the Custodian stepped into the shoes of the possessor (not the owner) of the credits and funds. These holdings point up sharply that the cited cases are inapplicable to the case at bar. The Custodian, cannot step into the shoes of an *indenture trustee* of a *continuing trust*. There is no basis whatsoever for the Custodian to assume the circumscribed rights and the corresponding onerous duties and liabilities of an *indenture* trustee. The Trading with the Enemy Act provides that the Custodian shall have the power of a *common-law* trustee in respect of all property, other than money, delivered to him (Trading with the Enemy Act, § 12, 40 Stat. 411, as amended, 50 U. S. C. App. § 12).

The veiled rebuke in the petition (p. 10) that "It is particularly important that it [the rule of the *Zittman* and *Singer* cases] should be recognized in the courts of New York where there is more litigation under the Act than in any other State"—is wholly unwarranted. The New York courts are particularly mindful of and sensitive to the protection of trusts and the discharge of fiduciary duties in accordance with the highest standards. They are reluctant to destroy a trust, particularly when the interests of the United States can be and are otherwise sufficiently protected, as in this case, by the "right, title and interest" vesting order and the provision for notice to the Custodian of any payment out of the trust.

C. Questions not briefed because neither decided nor necessary to the decision of the State Courts.

We have refrained from briefing the following questions because they were neither actually decided nor necessary to the decision of the New York courts:

1. That the instrument entitled "Amendment to Vesting Order 4551", dated April 6, 1953, issued eight years

after the cessation of hostilities and 18 months after the formal termination of the state of war between the United States and Germany is unlawful, unconstitutional, contrary to the Trading with the Enemy Act, and subversive of the basic purpose of the Act;

2. That a provision in a treaty furnishing the consent of a foreign state to seizure of its nationals' assets for the purpose of payment of claims of United States nationals cannot support an argument that Congress can authorize seizure of property in time of peace by *unilateral* act. Statutory vesting and seizure must constitute a valid exercise of a power granted by the Constitution—a power available only in time of war;

3. That the trust *res* was not subject to vesting or seizure prior to January 1, 1947 under the provisions of the Trading with the Enemy Act;

4. That Vesting Order 4551, dated January 29, 1945, vesting "all right, title, interest and claim" in the trust of the settlor, his wife and three children, as well as of other specified persons alleged to be "enemy nationals", exhausted the vesting power of the Custodian based upon the same underlying operative facts. The "Amendment" is unlawful and merely a device to circumvent the binding effect of the prior judgment by seizing the entire trust *res*, including the interests in the trust of persons concededly not enemies, whose interests were not and could not have been vested prior to January 1, 1947;

5. That the cavalier relegation of the infant Hans Dietrich Schaefer to the remedies of Sections 9(a) and 32 of the Trading with the Enemy Act does not satisfy the requirements of due process of law. Born in the United States in 1953, this American citizen would be confronted with an argument advanced in similar cases by the Custodian which, if accepted in this case, renders the statutory remedies illusory. Both Sections 9(a) and 32 require that

the claimant establish, as of the time immediately prior to seizure, his ownership of a proprietary interest in the property.

Conclusion

The decision of the State Courts resolves no substantial federal question, no question of general importance, but properly determines the narrow issues raised by the particular facts of this case. There is no conflict of decision. Indeed, this case is *sui generis*. The interests of justice would best be served by denial of the petition for a writ of certiorari.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

January, 1956

Respectfully submitted,

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